

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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BARRY GREEN, PHILIP NOONAN,
KENNETH PALTZIK and LISA SOTO,

Plaintiffs,

-against-

LAKESIDE MANOR HOME FOR ADULTS, INC.,
and LAKESIDE MANOR HOME FOR ADULTS, INC.,

Defendants.

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DCM PART 6

Present:

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No. 104359/07

Motion Nos. 893-006
1069-007

The following papers numbered 1 to 10 were marked fully
submitted on the 5th day of May, 2011.

Papers
Numbered

- Notice of Motion for Summary Judgment by
Defendants, with Supporting Papers,
Exhibits and Memoranda of Law
(dated April 7, 2011).....1
- Affidavit in Support by Plaintiff Kenneth Paltzik,
with Exhibit
(dated April 20, 2011).....2
- Affirmation in Support by Plaintiff, with Exhibits
(dated April 25, 2011).....3
- Affidavit in Support by Plaintiff Barry Green,
with Exhibits
(dated April 25, 2011).....4
- Affidavit in Support by Plaintiff Lisa Soto
(dated April 25, 2011).....5
- Affidavit in Support by Plaintiff Philip Noonan
(dated April 25, 2011).....6
- Notice of Cross Motion for Summary Judgment by
Plaintiffs, with Memorandum of Law
(dated April 26, 2011).....7
- Reply Affirmation by Defendants, with Exhibits
and Affidavit
(dated April 28, 2011).....8

RICHMOND COUNTY CLERK
2011 JUL 12 P 2:40
DIVISION OF LAW & EQUITY

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Papers
Numbered

Reply Memorandum of Law in Support of Defendants'
Motion for Summary Judgment and in Opposition
to Plaintiffs' Cross Motion for Summary Judgment
(dated May 2, 2011).....9
Reply Affirmation by Plaintiffs, with Exhibit and
Memorandum of Law
(dated May 3, 2011).....10

Upon the foregoing papers, defendants' motion (No. 893) for summary judgment dismissing the complaint is granted; plaintiffs' cross motion for summary judgment (No. 1069) is dismissed as academic.

Plaintiffs are four residents of defendant Lakeside Manor Home for Adults (hereinafter "Lakeside Manor"), a private proprietary adult-care facility. In their complaint, plaintiffs allege that, in conformity with the implementing regulations of Social Services Law § 461-d set forth in 18 NYCRR 487.11 (1) (15) and based on the number of residents at Lakeside Manor, the facility had provided an insufficient number of public telephones; that plaintiffs had been wrongfully charged to dial toll-free telephone numbers from the public telephones; that access to certain telephone numbers had been blocked; and that, as a result thereof, plaintiffs

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had been hampered in their ability to communicate privately with friends, family members, attorneys, financial institutions, and various service and alternative housing providers. As a result, an action was commenced in Supreme Court, Richmond County on November 15, 2007, wherein plaintiffs asserted four causes of action against Lakeside Manor sounding in (1) breach of contract; (2) breach of the warranty of habitability; (3) violation of the anti-discrimination provisions of the Federal Fair Housing Act (42 USC § 3604 [f] [2]); and (4) violation of the Social Services Law.

On March 8, 2008, this Court granted plaintiffs' application for preliminary injunctive relief and ordered that an additional pay telephone be installed by Lakeside Manor. It is undisputed that as a result of that order, defendants installed a new pay phone and stopped charging for toll free calls. Then, on October 7, 2008, this action was transferred to the Civil Court, Richmond County, under the auspices of CPLR 325(d).

Following the completion of pre-trial disclosure, the parties cross-moved for summary judgment. Civil Court denied both motions based on its determination that triable questions of fact existed

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which precluded summary judgment. On defendants' appeal from so much of the order as denied their motion for summary judgment, Appellate Term reversed, holding that Civil Court lacked subject matter jurisdiction over the action (see Green v Lakeside Manor Home for Adults, Inc., 30 Misc3d 16 [2010]). Back before this Court, the parties have reprised their cross motions for summary relief.

Defendants' motion for summary judgment is granted and plaintiffs' cross motion is dismissed.

The regulation which plaintiffs are seeking to enforce, 18 NYCRR 487.11(1)(15), provides in relevant part, that "all facilities shall, with the cooperation of the telephone company, have at least one telephone available for outside calls for every 40 residents or portion thereof. The operator may impose equivalent charges for [their] use". In the opinion of this Court, this requirement has been satisfied by the facility.

In an affidavit in support of summary judgment, Sander Lustig, a principal of Lakeside Manor, states that the facility maintains two pay telephones in the lobby which are available to residents

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for outgoing calls, as well as numerous other telephones located in various offices on the first floor of the facility, each of which is also capable of making outgoing calls. More importantly, it is averred that in May 2008, Time-Warner completed the re-wiring of the entire facility to provide the residents with digital telephone service in their respective rooms, and that federal telephone programs such as Virgin Mobile Assurance Wireless, provides free mobile telephone service and free minutes to all eligible participants. Accordingly, Lustig contends that each resident now has the ability to make outgoing calls directly from his or her room, access over and above any required by law.

None of the above is disputed by plaintiffs in their opposing affidavits. Additionally, there is no competent evidence before the Court suggesting that these upgrades and alternatives are insufficient to bring Lakeside Manor into full compliance with the relevant regulation.

In further support of defendants' motion, Amy Chevalier, Executive Director of the New York Coalition for Quality Assisted Living, acknowledges that the facility presently meets the relevant

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telephone access requirement because (1) the regulation in question does not specify that "pay" telephones are required; (2) the 2008 wiring upgrade and the federal "Lifeline Program" presently provides each resident with the ability to make and receive telephone calls from his or her own room; and (3) the Department of Health, through their own regulatory process, has approved the new telephone system, which has been in operation since November 2008 (see Defendants' Exhibit "G").

In view of the foregoing, defendants have satisfied their burden of demonstrating prima facie their right to judgment as a matter of law. In opposition, plaintiffs have failed to raise any nonspeculative issues of fact or demonstrated any other meritorious basis on which to deny defendants' motion.

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED, that plaintiffs' cross motion is dismissed as academic; and it is further

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ORDERED, that the Clerk enter judgment and mark his records accordingly.

E N T E R,



J.S.C.

Dated: *July 6*, 2011

GRANTED
JUL 11 2011

JUL 9 2011